OLC 76-1190

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

Executive Registry
76-2000

24 APR 1976

OGC Has Reviewed

Honorable J. Glenn Beall, Jr.
United States Senate
Washington, D.C. 20510

Dear Senator Beall:

I am writing to express the appreciation of Agency personnel and their families for your leadership and timely efforts to protect the identities of Agency people who are under cover.

Putting an end to the identification of intelligence personnel, which is the goal of your bill, S. 3242, is the most pressing aspect of the broader problem of protecting our nation's intelligence sources and methods. As you know, existing law is almost completely inadequate in preventing disclosures of, and often therefore, destruction of our intelligence sources and methods, both human and technical. Legislation which the President has proposed would establish a criminal penalty for unauthorized disclosure of intelligence sources and methods. Enactment of this legislation would give these important assets the protection they deserve.

Once again, thank you for your concern and support in this matter, and please let me know if I can be of any assistance.

Sincerely,

/s/ George Bush

George Bush
Director

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Executive Registry
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Executive Secretary

Date

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COMMITTEE ON THE JUDICIARY

U.S. House of Representatives

Washington, D.C. 20515

April 2, 1976

IN RE: H.R. 11365 -- To provide for the personal safety of those persons engaged in furthering the foreign intelligence operations of the United States.

Honorable George Bush
Director of Central Intelligence
Central Intelligence Agency
Washington, D.C. 20505

Dear Sir:

Enclosed herewith are copies of the captioned bill pending before this Committee.

I shall appreciate your furnishing the Committee with an expression of your views on the proposed legislation.

Sincerely yours,

Peter W. Rodino, Jr.
Chairman

PWR/ths
Enclosures

cc: Office of Management and Budget
Room 460, Legislative Reference Division
Executive Office Building
Washington, D.C. 20503

(EXECUTIVE REGISTRY FILE W-7.1)

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6/24/98

Approved For Release 2002/05/20 : CIA-RDP79M00467A002700030001-9

94TH CONGRESS
2D SESSION

H. R. 11365

IN THE HOUSE OF REPRESENTATIVES

JANUARY 19, 1976

Mr. MICHEL introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide for the personal safety of those persons engaged in furthering the foreign intelligence operations of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 793 of title 18, United States Code, is amended by adding at the end thereof the following subsection:

"(h) Whoever, (1) being or having been in authorized possession or control of information identifying or tending to identify any individual or entity as being or having been associated with or engaged in the foreign intelligence operations of the United States, which information has been specifically designated as requiring a specific degree of pro-

tection pursuant to the provisions of a statute or Executive order, willfully discloses such information to any person not authorized to receive it or to the public; or (2) not being duly authorized by or pursuant to law to do so, willfully imparts or communicates to any person or makes public any information identifying or tending to identify any individual as one who at any time has been or is presently engaged in furthering foreign intelligence operations on behalf of the United States, with the intent to disclose an affiliation or relationship of such individual with such foreign intelligence operations, knowing or having reason to believe that such disclosure may prejudice the safety or well-being of the individual identified—

"Shall be fined no more than $10,000 or imprisoned not more than ten years, or both.".

Approved For Release 2002/05/20 : CIA-RDP79M00467A002700030001-9

94TH CONGRESS
2D SESSION

H. R. 11365

A BILL

To provide for the personal safety of those persons engaged in furthering the foreign intelligence operations of the United States.

By Mr. MICHEL

JANUARY 19, 1976
Referred to the Committee on the Judiciary

SENDER WILL CHECK CLASSIFICATION TOP AND BOTTOM

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OFFICIAL ROUTING SLIP

TO	NAME AND ADDRESS	DATE	INITIALS
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Remarks:

This is the DCI's cy. If he should see or be "aware" will you pls undertake same. Thanks — I mean, Cheers.

Ben

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FROM: NAME, ADDRESS AND PHONE NO.	DATE
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Ref-76-614
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March 22, 1976

ATINTL

[redacted]

ATINTL

Special Counsel to Director
Central Intelligence Agency
Washington, D.C. 20505

[redacted]

You may recall that several weeks ago, in connection with the murder of Mr. Welch, we were asked by the Director of Central Intelligence what jurisdiction the Department might have over crimes of this kind, including those committed against Agency personnel entirely outside the United States. This question was raised again at a meeting between Mr. Colby, Mr. Levi and other Department officials on January 19, 1976.

Enclosed is our research on this question. I should add, as the memorandum does, that we are treading new ground here. Nevertheless, we conclude that jurisdiction exists sufficient to investigate and prosecute under circumstances outlined in the memorandum.

We have not heard from the Agency since the January 19 meeting. Should the Director desire further effort within the scope of our statutes, please call.

Sincerely,

J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

cc: Mr. George H. Bush
Mr. John Warner

W-7.1

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

DATE: JAN 30 1976

FROM : R. D. Martin
Attorney - Criminal Section

RDM:gal

SUBJECT:

Question: Does 18 United States Code §245 (b)(1)(c) apply extraterritorially?

Background: A representative of the CIA recently asked the Civil Rights Division whether 18 U.S.C. §245 (b) (1) (c) would apply to the killing of CIA Station Chief Welch in Athens. That provision reads:

> "(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with--
>
> (1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from---
> ...(c) applying for or enjoying employment, or any perquisite thereof, by any agency of the United States."

The criminal section has determined that: a) §245 covers the use of force against CIA personnel because of their work; and b) if any part of the crime or any conspiracy to commit the assassination took place within the United States, the statute would apply. The remaining question, with which this memorandum is concerned, is whether the statute could apply to an act, committed by either U.S. citizens or aliens, which took place wholly outside the territorial jurisdiction of the United States.

5010-110

The question could be important for two reasons. The U.S. government will need to know what legal positions are possible if and when the assassins are caught, and more immediately, the FBI's authority to investigate depends on whether any evidence exists that an "offense against the United States" has been committed.

Conclusion: There is no Constitutional or international law impediment to the extraterritorial application of §245 (b)(1)(c). There is a basis to believe that the statute would be construed extraterritorially sufficient to justify prosecution of the assassins, if they were to come within the personal jurisdiction of an American court. Consequently, there are ample legal grounds to justify FBI investigation of the case, even though there may be no evidence of American involvement.

DISCUSSION

Three questions need to be explored in order to determine the extraterritorial effect of any law passed by Congress. They are: 1) Under generally accepted principles of international law, does a state have the power to enact the law in question? 2) Does the U.S. Congress, under the Constitution, have that power? 3) Did Congress, in fact, enact a law with extraterritorial application? See generally, George, Extraterritorial Application of Penal Legislation, 64 Mich. L. Rev. 609 (1967). The law of nations generally permits a state to exercise criminal jurisdiction over acts which occurred outside its territory, so long as the state does not "overstep the limits which international law places upon its jurisdiction." The S.S. Lotus, P.C.I.J., Ser. A. No. 10 (1927), 22 Am. J. Int'l L. (1928). 1/ International law incorporates

> five general principles on which a more or less extensive penal jurisdiction is claimed by States at the present time. These five general principles are: first, the territorial principle, determining jurisdiction by reference to the place where the offence is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or

1/ Of course, before a country could actually exercise criminal jurisdiction, i.e., try an offender, the defendant would have to be within its territorial jurisdiction. The Lotus, supra. For a taste of U.S. Jurisprudence governing the effect of the manner in which personal jurisdiction is acquired, compare U.S. v. Toscanino, 500 F.2d 267 (2nd Cir. 1944), with U.S. v. Cotten, 471 F.2d (9th Cir. 1973) cert. den. U.S. (1973).

national character of the person committing the offence; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offence; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offence. Of these five principles, the first is everywhere regarded as of primary importance andof fundamental character. The second is universally accepted, though there are striking differences in the extent to which it is used in the different national systems. The third is claimed by most States, regarded with misgivings in a few, and generally ranked as the basis of an auxiliary competence. The fourth is widely though by no means universally accepted as the basis of an auxiliary competence, except for the offence of piracy, with respect to which it is the generally recognized principle of jurisdiction. The fifth, asserted in some form by a considerable number of States and contested by others, is admittedly auxiliary in character and is probably not essential for any State if the ends served are adequately provided for on other principles. Harvard Research in International Law, 29 Am. Journal of Int'l. L., 445 (1935), herein after referred to as Harvard Research.

Of these five principles, the universality principle applies to certain specific crimes, not relevant here, such as piracy, while the passive personality principle has never been well accepted and has always been vigorously opposed by the United States. Harvard Research pp. 563, 585. Therefore, only the territorrial, nationality and protective principles are relevant to the present inquiry.

The United States, like most nations, concurs in the "objective" expansion of the territorial principle, which holds that acts occurring outside of a state's territory which produce effects within that state are subject to the jurisdiction of the state in which the effects are felt. 2/

2/ The "subjective" territorial principle would allow American jurisdiction over this crime if there had been any participation within the United States.

The classic American statement of that principle was by Justice Holmes in Strassheim v. Daily, 221 U.S. 280, 285 (1911): "acts done outside a jurisdiction, but intended to and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power." See also Ford v. U.S., 273 U.S. 593 (1927).

A typical case under the objective principle would be one in which a package containing a bomb intended to explode upon opening is sent across a border. This does not mean, however, that an effect less explosive than a bomb cannot justify jurisdiction under the objective principle. The principle has been used to support jurisdiction in crimes involving drug smuggling 3/, defrauding the United States 4/, and inducing an American to travel in interstate commerce in the execution of a fraudulent scheme. 5/ In one case, the objective principle was even used to justify jurisdiction over a defendant who possessed, forged and uttered United States Treasury checks in Mexico, since his acts prevented "the normal disbursement of Social Security funds to those lawfully entitled to receive such funds." U.S. v. Fernandez, 496 F.2d 1294 (5th Cir. 1974).

An argument could be made that, although Welch's killing took place in Greece, it was intended to and did have effect within the United States in that it intimidated and/or interfered with U.S. government officials and CIA operatives as a class. Since the definition of this crime is not the killing, but the use of force to intimidate or interfere with a person or class of persons, it could reasonably, although perhaps not compellingly, be maintained that the real criminal effect of the use of force took place within, not without, the United States. Although there might indeed be weaknesses in such a position, the same argument, slightly modified, achieves considerably more strength when asserted under the"protective" principle of international law.

3/ Rivard v. U.S. 375 F.2d 882 (5th Cir. 1967). See also Brulay v. U.S. 383 F.2d 345 (9th Cir. 1967).

4/ U.S. v. Cotten, 471 F.2d 744 (9th Cir. 1973).

5/ Charron v. U.S. 412 F.2d 657 (9th Cir. 1969).

The Protective Principle

According to the protective principle of jurisdiction with respect to the enforcement of criminal law, a state

> "has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems." Restatement (2nd), Foreign Relations, §33 (1965). 6/

American courts have occasionally considered the protective principle as very similar to the objective territoriality principle, since any "act which would offend the sovereignty of a nation must, of necessity, have some effect within the territorial limits of that state or there would be no adverse effect upon the government justifying a penal sanction." U.S. v. Rodriguez, 182 F.Supp. 479, 489 (S.D. Cal. 1960). See also Rocha v. U.S., 288 F.2d 545 (9th Cir. 1961).

The protective principle, however, does not require the sort of direct injury within a country, like the classic bomb in a postal parcel, but rather contemplates injury to the state apparatus itself.

> "Where the effect is felt by private persons within the State, penal sanctions rest on the 'objective' or 'subjective' territorial principle used in the Strassheim case, supra...Where the effect of the acts committed outside the United States is felt by the government, the protective theory affords the basis by which the state is empowered to punish all those offenses which infringe upon its sovereignty, whenever these actions take place and by whomever they may be committed." U.S. v. Rodriguez, supra at 488.

6/ The Harvard Research states the protective principle as follows: "A State has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that state, provided that the act or omissions which constitutes the crime was not committed in the exercise of a liberty guaranteed the alien by the laws of the place where it was committed." p. 543.

Indeed one U.S. circuit court has declared that jurisdiction under the protective principle exists because of the potential effect the prohibited actions have upon governmental functions, and that "there need not be any actual effect in the country as would be required under the objective territorial principle." U.S. v. Pizzarusso, 388 F.2d 8 (2nd Cir. 1968). Since the assassination or use of any force against employees of the American government obviously affects the governmental function of the United States (and this case certainly affects the national security), there is compelling reason to believe that §245, if applied extraterritorially, would be a valid exercise of the protective function. 7/

Nationality

Almost all countries apply their protective laws to aliens as well as to their nationals. Harvard Research Article 7. Traditionally, however, the United States has been one of those few states which, relying primarily on the territoriality and nationality principles, has been extremely reluctant to ascribe extraterritorial effect to statutes.8/ See e.g. American Banana Co., v. United Fruit Co., 213 U.S. U.S. 347 (1909); U.S. v. Baker, 136 F. Supp 546 (S.D. N.Y. 1955). That tradition

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7/ The Criminal Division informs me that they have prosecuted a case in which American citizens killed an embassy security official in Mexico. The defendant plead guilty. Also, certain overt acts of the conspiracy took place in the United States. U.S. Courts have held that the protective principle includes such offenses as defrauding the United States and theft of government property. See Rocha v. U.S. 288 F.2d 545 (7th Cir. 1961); United States v. Birch, 470 F.2d 808 (4th Cir. 1972).

8/ As late as 1940, a Counselor of the Department of State could instruct the American Consul General in Mexico that "[the U.S.] maintains that according to the principles of international law, the penal laws of a state, except with regard to nationals thereof, have no extraterritorial force." 6 Whiteman, Digest of International Law, p. 104 (Dept. of State 1968)

notwithstanding,9/ courts have, in cases in which extraterritorial application was justified under the protective principle, taken jurisdiction over aliens as well as citizens. The cases have generally involved committing perjury before consular officials and defrauding the United States, both considered to be offenses against the sovereignty of the United States. See U.S. v. Pizzarusso, supra; U.S. v. Rodriguez, 182 F. Supp. 479 (S.D. Cal. 1960) and cases cited therein; Rocha v. U.S. 288 F.2d 545 (9th Cir. 1961); See also Rivard v. U.S., 375 F.2d 882, 887 and 887 fn. 12 (5th Cir. 1967). The last Supreme Court consideration of the question left the question open, but in a way that "seems to imply that certain statutory provisions for the protection of United States agencies might be applied to aliens for acts committed abroad." Harvard Research at 544. In United States v. Bowman, 260 U.S. 94 (1922) the Court held that in the cases of statutes "enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated," U.S. citizens could be prosecuted for acts committed outside the territorial limits of the United States. Chief Justice Taft then said:

> The three defendants who were found in New York were citizens of the United States and were certainly subject to such laws as it might pass to protect itself and its property... The other defendant is a subject of Great Britain. He has never been apprehended, and it will be time enough to consider what, if any, jurisdiction the District Court below has to punish him when he is brought to trial." 260 U.S. at 102. 10/

9/ Some provisions of American law are difficult to reconcile with the "tradition" exemplified in fn. 8, supra. For example, the United States has imposed criminal liability on aliens for committing perjury before American diplomatic or consul officers for 120 years. Harvard Research at 544; U.S. v. Pizzarusso, 388 F.2d 8, (2nd Cir. 1968).

10/ This language also seems to indicate that, whatever the ultimate merits of the alien's case, it would be proper to investigate and try him.

CONSTITUTIONALITY

It is generally recognized that it is Constitutionally permissible for Congress to enact penal laws which have extra-territorial application in accordance with international law. See George, Extraterritorial Application of Penal Legislation, 64 Mich. L. Rev. 609 (1967). Comment, Federal Jurisdiction Over Crimes Committed Abroad by Aliens, 13 Stanford L. Rev. 155 (1960); U.S. v. Rodriguez, supra. Among the provisions advanced to support such action are the clauses which delegate to Congress the power to lay and collect taxes, regulate foreign commerce, and punish offenses against the law of nations. In addition, it has been argued that this power is inherent in the exercise of national sovereignty.

SECTION 245(b)(1)(c)

Since §245 contains no specific reference to extra-territoriality, the test for determining its extraterritorial effect must stem from United States v. Bowman, 260 U.S. 94 (1922). In Bowman, 11/ the Court stated that the:

> "the necessary locus, when not specifically defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under law of nations."

The Court delineated two categories of crime.

> 'Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery,

11/ Bowman has been followed by most subsequent discussions which have had to deal with the question of extraterritoriality. It has also been adopted by the "Final Report of the National Commission on Reform of Federal Criminal Laws: Proposed New Federal Criminal Code" (1971).

arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard. ...

But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents. Some such offenses can only be committed within the territorial jurisdiction of the government because of the local acts required to constitute them. Others are such that to limit their locus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and in foreign countries, but allows it to be inferred from the nature of the offense. Many of these occur in c. 4, which bears the title 'Offenses against the Operations of the Government'".

Among the types of crime which would naturally be interpreted to have extraterritorial effect, the Bowman court said, would be the statute prohibiting:

> "bribing a United States Officer of the civil military or naval service to violate his duty or to aid in committing a fraud on the United States. It is hardly reasonable to construe this not to include such offenses when the bribe is offered to a consul, ambassador, an army or a naval officer in a foreign country ..." 260 U.S. at 99.

Another statute which would be construed to have extraterritorial effect would be one making it a crime:

> "to steal, embezzle or knowingly apply to his own use ordnance, arms, ammunition, clothing, subsistance, stores, money or other property of the United States furnished or to be used for military or naval service. It would hardly be reasonable to hold that if anyone, certainly if a citizen of the United States, were to steal or embezzle such property, which may properly and lawfully be in the custody of army or naval officers either in foreign countries, in foreign ports or on the high seas, it would not be in such places an offense which Congress intended to punish." at 99-100.

Subsequent cases, as mentioned above, have construed statutes prohibiting the giving of false statements to U.S. officials and the theft of government property to have extra-territorial effect. U.S. v. Rodriguez, supra; U.S. v. Birch, 470 F.2d 808 (4th Cir. 1972). Certainly it can be argued that the use of force or threat of force on a government official, like the theft of government property, is prohibited "because of the right of the Government to defend itself against obstruction..." Moreover, government employees, like government property can be found anywhere, even in foreign countries, and it does not seem reasonable that Congress intended the property of the United States government to be protected the world over, but its personnel only at home.12/

On the other hand, it could be maintained that §245 was enacted as part of Civil Rights legislation intended to secure certain rights within the United States. The legislative history of the statute deals with this nation, never foreign countries. The provision prohibiting intimidations of government employees originally was limited to incidents involving race or color but was amended just before final passage, indicating that the intent of Congress was primarily to insure domestic rights, not protect officials abroad.13/

12/ See fn. 8 supra. See also United States v. Smith, 398 F.2d 595 (4th Cir. 1968) generally, and fn. 1 which says: "Officers and employees of the United States are protected while engaged in the performance of their official duties... whether or not they are on property over which the United States has territorial jurisdiction. 18 U.S.C. §1114."

13/ The "race or color" requirement was stricken as part of a compromise to placate southern senators who argued that it was wrong to prohibit violence directed against blacks by whites, but not between people of the same color.

Certainly language can be found in the legislative history of §245 similar to that used in United States v. Toscanino, 500 F.2d 267 (2nd Cir. 1974), to find that the federal statute governing wiretapping, 18 U.S.C. §2150 et seq., has no application outside the United States. (In that case the court relied on statements like "through our Nation's communications network" italicized by the court). Nevertheless, even a strict civil rights statute requiring racial motive might warrant extraterritorial application. After all, could Congress, for example, have intended that South Africa zealots who assassinated a black American ambassador for racial reasons would be immune from prosecution if they should later come to the United States to discuss their act on the talk shows?

In short, there is a sound basis upon which to assert that Congress intended §245(b)(1)(c) to apply exterritorially. To be sure, arguments based both on the legislative history of §245 and on the United States traditional reluctance to sanction extraterritorial jurisdiction could be used, with considerable force, to attack that conclusion, but, on balance, I believe that there is sufficient reason to believe that a prosecution could be brought under the statute if Mr. Welch's killers were ever to come under the personal jurisdiction of an American court. Consequently, there is sufficient evidence to authorize an FBI investigation of this "offense against the United States," under American law.

FBI INVESTIGATION

As a postscript, as far as I could determine, as recently as 1972, there was no treaty between the United States and Greece governing police activity. Under general principles of international law, unofficial police investigations (not arrests of course) conducted within the territory of another state do not require consent, in the absence of a treaty or a provision in the law of the state in which the investigation is to take place. Restatement, Foreign Relations, Tentative Draft No. 2, (1958).